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IN THE SUPREME COURT OF THE UNITED STATES

Nos...

OCTOBER TERM 1947

No...

KENNECOTT COPPER CORPORATION, a corporation,
Petitioner,

vs.

SALT LAKE COUNTY, a political subdivision of the State of Utah,
Respondent.

No...

SILVER KING COALITION MINES COMPANY, a corporation,
Petitioner,

vs.

SUMMIT COUNTY, a body corporate and politic of the State of Utah; and AGNES FARNSWORTH, as Treasurer of SUMMIT COUNTY, UTAH,
Respondents.

No...

PARK UTAH CONSOLIDATED MINES CO., a corporation,
Petitioner,

vs.

SUMMIT COUNTY, a body politic and corporate of the State of Utah; and AGNES FARNSWORTH, Treasurer of SUMMIT COUNTY, UTAH,
Respondents.

No...

PARK UTAH CONSOLIDATED MINES CO., a corporation,
Petitioner,

vs.

WASATCH COUNTY, a body corporate and politic of the State of Utah; and MARY L. GILES, Treasurer of WASATCH COUNTY, UTAH,
Respondents.

No...

NEW PARK MINING COMPANY, a corporation,
Petitioner,

vs.

WASATCH COUNTY, a body corporate and politic of the State of Utah; and MARY L. GILES, as Treasurer of WASATCH COUNTY, UTAH,
Respondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that writs of certiorari be issued to review the respective judgments of the United States Circuit Court of Appeals for the Tenth Circuit entered in these cases April 14, 1947. (R. 303-5)

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit will be found at page 295 of the record; it is reported at 163 F. 2d 484. The opinion of the United States District Court for the District of Utah, Central Division, was not reported but will be found in the record at page 174. This opinion is brief, for it refers to the Court's opinion in companion subsidy cases reported in 60 F. Supp. 181.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 14, 1947. (R. 303-5). Petitions for rehearing were denied October 6, 1947. (R. 359). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U.S.C. A. Sec. 347 (a)).

QUESTIONS PRESENTED

The questions presented are:

1. Whether the states (here the State of Utah) have

the power, in the absence of Federal consent, to levy a property tax based upon subsidies paid by the Federal government to the mine operators to stimulate the production of metals essential to the successful prosecution of the war. By these subsidies the government sought to defray, in whole or in part, the otherwise prohibitive costs to be incurred in exploring for, developing and increasing essential production, regardless of cost and waste.

2. May the taxing authorities of the State of Utah, for the purpose of an ad valorem tax, evaluate mines by a multiple of the amount of subsidies paid by the National government for the National purpose just stated? Must not such action by the State contravene the due process and equal protection clauses of the Fourteenth Amendment and as well Sections 8 and 10 of Article I of the Constitution of the United States.

3. Whether respondent Salt Lake County (with respect to Kennecott alone) has violated the requirements of the State and Federal Constitutions, by levying an arbitary and discriminatory tax, contrary to Utah statutes prescribing the method of and measure of value for such levies.

STATUTES INVOLVED

Sections 901 and 902 of the Federal Emergency Price Control Act of January 30, 1942 (50 U.S.C.A. App. Secs. 901 and 902; c. 26, Title I, Secs. 1 and 2, 56 Stat. 23 and 24), which authorized the payment by the Federal Government of "subsidy payments" to domestic producers, such as petitioners,

whenever it determined that the maximum necessary production of any essential commodity was not being obtained.[1]

Sections 8 and 10 of Article I of the Constitution of the United States, which delegate to Congress the power to wage war and deny that power to the states.

Article XIII, Sections 2 and 3 of the Utah Constitution, requiring that all tangible property be taxed in proportion to its value and that the legislature provide a uniform and

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[1] Sec. 901. Purposes; time limits; applicability.

(a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to *assure that defense appropriations are not dissipated by excessive prices; * * * to assist in securing adequate production of commodities and facilities; * * * and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."*

Sec. 902. Prices, rents, and market and renting practices.

(e) Whenever the Administrator determines that maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, * * * make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof. Provided, that in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended (Title 15, Secs. 616b, 609j), such determinations shall be made by the Federal Loan Adminisrator, with the approval of the President, and, notwithstanding any other provisions of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d (Title 15, Secs. 606b, 609j).

equal rate of assessment and taxation for that purpose.[2]

Amendment XIV to the Constitution of the United States, forbidding deprivation of property without due process of law and the denial of the equal protection of the laws.

Sections 7 and 24 of Article I of the Utah Constitution, forbidding deprivation of property without due process of law and requiring that all laws of a general nature have uniform operation.[3]

Section 80-3-1 (5), Utah Code Annotated 1943, defining "Value.'"[4]

Sections 80-5-56 and 57, Utah Code Annotated 1943, which, in prescribing ad valorem taxes for metalliferous mines or mining claims under the Utah Constitution, establish as the base for determining the value of the property to be taxed, $5.00 per acre plus two times the net proceeds realized from

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[2] Article XIII, Sec. 2, Utah Constitution. "All tangible property in the State * * * shall be taxed in proportion to its value * * *." (Repeated by Sec. 80-1-1, Utah Code Annotated 1943).

Article XIII, Sec. 3, Utah Constitution. "The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all tangible property in the State, according to its value in money, and shall prescribe by law such regulations as shall secure a just valuation for taxation of such property, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its tangible property. * * *"

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[3] Article I, Sec. 7, Utah Constitution. "No person shall be deprived of life, liberty or property, without due process of law."

Article I, Sec. 24, Utah Constitution. "All laws of general nature shall have uniform operation."

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[4] 80-3-1 (5). "'Value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor."

marketing the ores.[5]

Article XIV, Section 11, Constitution of Utah, requiring that mines be assessed by the State Tax Commission.[6]

Section 80-5-3, Utah Code Annotated 1943, requiring that the county assessors of the several counties assess all taxable property not required to be assessed by the State Tax Commission.[7]

STATEMENT

Since 1942 and including 1947 the Federal government, in order to obtain essential production of copper, lead and zinc, paid subsidies to domestic producers, including petitioners, as empowered by the Federal Emergency Price Con-

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[5] 80-5-56. *Assessment of Mines.* ..All metalliferous mines and mining claims, both placer and rock in place, shall be assessed at $5 per acre and in addition thereto at a value equal to two times the net annual proceeds thereof for the calendar year next preceding.

80-5-57. "*Net Annual Proceeds Defined.* The words 'net annual proceeds,' of a metalliferous mine or mining claim are defined to be the gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores from such mine or mining claim extracted by the owner or lessee, contractor or other person working upon or operating the property, *including all dumps and tailings,* during or previous to the year for which the assessment is made, less the following, and no other deductions."

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[6] Article XIV, Sec. 11, Constitution of Utah. "* * * The State Tax Commission shall administer and supervise the tax laws of the State. It shall assess mines * * *."

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[7] 80-5-3. "* * * all mines and mining claims * * * including * * * all machinery used in mining and all property or surface improvements *upon or appurtenant to mines or mining claims* * * * must be assessed by *the state tax commission* as hereinafter provided. * * * All taxable property not required by the constitution or by law to be assessed by the state tax commission must be assessed *by the county assessor* of the several counties in which the same is situated * * *."

trol Act (50 U.S.C.A. App. Sec. 902).[8] During the first year of the subsidy payments Utah's State Tax Commission decided that these payments should be *excluded* in computing "Proceeds realized *** from the sale or conversion into money or its equivalent of all ores," under the Utah statute determining the basis for the ad valorem property tax of mines (Sec. 80-5-57, Utah Code Annotated 1943). The following year the Commission reversed this position (R. 80), and for that year petitioners paid the tax under protest (R. 90), and brought these five cases in the District Court of the United States for the District of Utah to recover the respective sums paid. (R. 1, 177, 207, 237, 267). The cases were consolidated for trial, and judgments were entered in favor of petitioners and against the various respondents as prayed. (R. 162, 201, 232, 260, 289).

Petitioners charged that these exactions were improper under the laws of Utah because the subsidies had been paid by the Federal government to defray all or part of the costs of production, exploration for and development of submarginal ore bodies and bore no relation whatever to the value of the mines, and also because the subsidies paid were not proceeds realized "from the sale or conversion into money or its equivalent of all ores," as required by the Utah statute.

Petitioners charged that the State of Utah, if it intended so to divert to the domestic uses of the State, these subsidies paid by the Federal government for the purpose of waging a

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[8] While these payments were particularly necessary during the war when price controls limited the market price of these commodities, necessity for continued domestic production has compelled the National government, under the same statutory authority, to continue its subsidies beyond the termination of both the war in 1945 and price control in 1946.

war, had acted in excess of its power; that the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, interfere with, or trespass upon the sovereignty of the United States; that these tax levies were a direct burden upon the *means* employed by the Federal government to wage war and constituted an unlawful diversion of such means, without the consent of the United States, from the stated National purpose to the general revenues and domestic purposes of the State. (R. 12 to 13). And petitioners insisted that the State's attempt to evaluate their properties by this yardstick, which bore not the slightest relation to value, was wholly arbitrary, was a denial, as to them, of the equal protection of the laws and a deprivation of their property without due process of law.

In addition, Kennecott complained that the tax levy upon its property had included an amount collected by respondent Salt Lake County on Kennecott's millsites, golf course and tailings pond which was arbitrary, discriminatory, and contrary to Utah statutes and in violation of the State and National constitutions. (R. 13 to 19).

The District Court held with petitioners on all points. (R. 175). Respondents appealed, and the Circuit Court of Appeals reversed and remanded with directions to enter judgments for defendants. (R. 303-5). Rehearing was denied October 6, 1947. (R. 359).

REASONS FOR GRANTING THE WRITS

1. At the present time, the law in the mining states with relation to the State's power to tax the National subsi-

dies under the circumstances here related, is in conflict and confusion, and such will continue until authoritative decision settles the question. Not only are the years since 1942 and including 1947 involved, but it would appear that the necessity for continued governmental support to encourage production of metals may require further legislation in place of the metal subsidy bill for 1948-9, vetoed by President Truman last August (H. R. 1602). From information received by counsel it would appear that more than seventy-five cases are pending in Utah, Nevada, New Mexico and other mining states. The amount is substantial.

The Utah Supreme Court, on the basis of the facts of the particular cases before the Court and by a divided tribunal, has held that the State has the power and intended to tax Federal subsidies. United States Smelting Refining and Mining Co. v. Phares Haynes, etc., 176 P. 2d 622, and Combined Metals Reduction Co. v. Tooele County, 176 P. 2d 630, decided January 6, 1947. Petitions for rehearing were denied September 16, 1947.

Montana has held to the contrary. Klies v. Linnane, 156 P. 2d 183.

The decisions of the Utah Supreme Court and the Circuit Court of Appeals have brought to the attention of the taxing authorities of other states, where the question has been dormant, the potential tax liability.

2. The question is or should be of importance to the Federal government for, if such power is to be conferred upon the states, the cost to the United States will increase

directly with the tax liability, resulting in payment of subsidies, not to the producer nor in aid of National objectives but to the taxing states for their domestic uses. As set out in the record (p. 68), President Charles B. Henderson, of the Federal government's Metals Reserve Company, which administered payment of the subsidies, has stated:

> "Premium payments made by Metals Reserve Company are not payments made by that Company or received by the mining companies for the sale or conversion into money or its equivalent of any ores * * * to the extent that any portion of such premiums are taken by a state on account of a property tax, the purpose of Metals Reserve Company in paying the same would be defeated. * * *"

There is no Federal consent to the inclusion of the subsidies in any such tax base; the administrator's statement as indicated above, is directly contrary to the ruling of the Circuit Court of Appeals.

The rationale of petitioners wherein the subsidies are involved, was well expressed in the decision of Judge Tillman D. Johnson, who construed the Federal statute October 30, 1944 in the Occupation Tax Cases, 60 F. Supp, 181. He there held:

> "The State of Utah, neither by its legislature nor by its Tax Commission, can say what the United States Government shall do with its own money. That is a matter that must be determined by Congress, and its determination of that question is final and conclusive upon all the courts of the nation, State and National.
>
> " * * * the Government, for its own reasons, and without consulting the Legislature of the State of

Utah or its Tax Commission, made these extra and additional payments, and the Congress called it a subsidy.

"It is recited and reiterated by some of the Government representatives who have written about this matter, that these payments were made to meet the additional cost and expense that would be incurred by producers in making this extra effort to add to its product. Well, I am inclined to the view that these gentlemen were entirely right in that construction of the statute as to the purpose which Congress had in authorizing these subsidy payments.

* * *

" * I am very clearly of the opinion that neither the state statute nor the Federal statutes give the Tax Commission any authority whatever to make these levies and collections."

When there came before him the cases at bar involving the ad valorem property tax on mines, he stated:

"I am of the opinion in these cases that on the issue of subsidy paid by the Government, the Tax Commission unlawfully and wrongfully included it in their tax assessment. That is the view I had of the situation in the cases tried heretofore, (the occupation tax cases supra) and I think that all of these cases are on all fours with those cases that have heretofore been tried." (R. 174)

The Circuit Court of Appeals, adverting in its opinion to the difficulty in distinguishing between taxation of governmental interests and taxation of private interests sanctioned by such cases as James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A.L.R. 318; Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140

A.L.R. 615; and Smith v. Davis, 323 U. S. 111, 89 L. ed. 107, 65 S. Ct. 157, decided the case at bar by saying:

> "The premium or subsidy payments were taken into consideration only as an element in the yardstick for measuring the value of the properties for purposes of ad valorem taxation. The inclusion of the premium or subsidy payments in the fixing of the tax base did not amount to a tax against the United States, its instrumentality, its activities, or its property; and it did not contravene any constitutional implication forbidding a tax under state law against the United States or its interests." (R. 299)

But to petitioners the cases are governed squarely by McCulloch v. Maryland, 17 U. S. 159, 4 Wheat. (U.S.) 316, 4 L. ed. 579, because the direct effect is the State's seizure of a portion of a fund paid by the National government for this paramount National purpose as stated in the Government's several contracts with mining operators. The State's seizure was to that extent, a diversion of those funds from the intended payment of operating costs incurred in exploration and in the development and production of ores, the stimulation of such production by these subsidies being the sole purpose of their payment.

This, it is respectfully submitted, is not the incidental and nondiscriminatory gross receipts tax of the Dravo case, or the sales tax of the Boozer case; it is just as much a tax upon the operations of the National government as was that attempted and declared void when Maryland levied a tax on the Bank of the United States in McCulloch v. Maryland. The Circuit Court of Appeals did not give weight to, seemingly did not perceive, the direct effect on the government

of sustaining the tax, the pro tanto frustration of the paramount National objectives to be attained by the subsidy payments. The Court assumed that there was involved only another incidental nondiscriminatory tax which the metal producers might as well pay to the State taxing authorities.

The direct and not merely the incidental effect of the proposed tax was and will be to take moneys paid for, and intended by the government to be used to defray, costs *other than the State property taxes,* and divert them pro tanto into respondents' treasuries for general State and County purposes. If the tax be sustained, the Federal government's purpose of producing more metals from sub-marginal operations, will be frustrated unless the National government shall itself pay this tax, and that certainly was contrary to Federal intent. The National government has not consented to the diversion of any part of its subsidies from their fixed purpose, which we think should be sufficient to condemn the State's seizure. If the seizure be approved, the amount thereof hereafter will rest only in the State's discretion.

3. In the case of Kennecott, the Circuit Court of Appeals, counsel respectfully submit, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision, in this:

The State Legislature and Judiciary alike, as well as the State and Federal constitutions, have enjoined upon the Utah taxing authorities the duty of making tax assessments according to the procedure and value standards prescribed, and without discrimination. (R. 131-144). The undisputed and admit-

ted facts show that such constitutional and statutory standards have been flagrantly ignored, the repudiation whereof has resulted in an arbitrary tax contrary to Utah law. The lower Court so held. (R. 175).

The Utah Supreme Court time and again has announced that Utah taxes may not be sustained if discriminatory and arbitrarily applied: e. g., Continental National Bank v. Naylor, 54 Utah 49, 179 P. 67. But the Circuit Court of Appeals reversed, *entirely ignoring this point.* Established judicial practice would seem to require sustaining the findings below when supported by evidence as was here the case. (R. 93, et seq). The Circuit Court of Appeals has declined to respect Utah law applicable to these assessments, has disregarded the legislative and constitutional mandates of both the State and the Nation and as well the many decisions of the court of last resort of the State of Utah relating thereto. It is submitted that such a departure justifies the consideration of this Court.

The assessments against Kennecott's tailings pond, found by the Circuit Court of Appeals to be "worthless" (R. 299), and against the millsites, were arbitrary, discriminatory, contrary to Utah law, and State and Federal constitutions, and void.

The law is beyond dispute.

> "Those 'whose property was intentionally assessed at a higher percentage or valuation than was placed on the general mass of taxable property in the county may invoke the aid of courts to compel the tax officers to reduce the excessive assessment so

made, to the same proportion of value as was placed upon the general mass of other taxable property in the county. A denial of such right results in inequality and a want of uniformity in the assessment and taxation."

First National Bank of Nephi v. Christensen, 39 Utah 568, 118 P. 778.

"It should be conceded * * * that the intentional and willful adoption of wrong principles, standards, or methods of asessing property for taxes, resulting in inequality, non-uniformity and discrimination to the injury of the taxpayer, entitles him to injunctive relief unless he otherwise has a plain, speedy and adequate remedy. * * * In our opinion it is fundamental, and must be true if the provisions of the Constitution and laws relating to taxation have any force or effect."

Continental National Bank v. Naylor, 54 Utah 49, 179 P. 67.

This principle is surely not just one for lip service; it is basic to our way of life. It is the Federal Rule as well. Cumberland Coal Co. v. Board, 284 U.S. 23, 76 L. ed. 146, 52 S. Ct. 48.

Specific evidence of the factual basis to bring this case under this rule was stipulated at the trial (R. 95 et seq). Respondent admitted the tailings dump to be "of little value." (R. 100). But it was assessed at $286,211.00. (R. 25). The Circuit Court noted that the dump was "worthless." (R. 299).

The millsite lands were also assessed at $45.73 per acre (R. 25), although respondent again admitted this property to be of little value under accepted and statutory standards of value. (R. 101, Sec. 80-3-1(5) Utah Code Annotated 1943). Identical adjacent land was assessed at $4.50 and $5.67 per acre (R. 95).

So the District Court on the basis of these undisputed facts and the elementary principles of law, said:

> "I am also of the opinion that the method pursued by the Tax Commission in arriving at the value of these lands, acted arbitrarily, and that their assessment was illegal on that account even if it be assumed that they had authority to assess them." (R. 175)

Kennecott's contention and the decision of the District Court was ignored by the Circuit Court of Appeals. *Its opinion is silent on this point.* The "value" figure bore no relation to the definition of Sec. 80-3-1, Utah Code Annotated 1943, or to Section 3, Article XIII of the Utah Constitution, and might just as well have been $100.00, $1000.00, or any other amount per acre once the prescribed standards were no longer controlling.

Kennecott attacked the assessment of the golf course on the further ground that it could lawfully have been made only by the *County Assessor,* that under Utah law the State Tax Commission had no authority whatever to make it. The unambiguous mandate of the Utah law on this point is:

a. Article XIV, Section 11, Constitution of Utah:

> " * * * The State Tax Commission shall * * * assess mines * * * ."

b. Section 80-5-3, Utah Code Annotated 1943:

> " * * * all mines and mining claims * * * must be assessed *by the state tax commission* as hereinafter provided * * * . All taxable property not required by the constitution or by law to be assessed by the state tax commis-

> sion must be assessed *by the county assessor* of the several counties in which the same is situated * * * ". (Italics ours).

On this point respondent itself in its brief said, "perhaps the assessment thereof should be by the county assessor instead of the State Tax Commission." And the District Court held:

> "It seems to me quite clear that the Tax Commission was not authorized to assess the land referred to as a recreational area." (R. 175)

The State Tax Commission, a different legal entity from respondents, was created in 1930 by amendment of Section 11, Article XIV, of the Utah Constitution; it then assumed the functions of the old State Board of Equalization. It had been held that the difference in the respective powers of the old Board and those of the County Assessors was such that action by one, when the other should have acted, was void. Salt Lake County v. Utah Copper Co., 294 F. 199, 202:

> " * * * There can be no doubt that the state of Utah intended to substitute, and by its Constitution and statutes in effect did substitute, the taxation by its board of equalization of the net annual proceeds of mines and mining claims for the taxation of such mines and mining claims in proportion to their value estimated by the taxing officers of the county and that it thereby exempted them from taxation by the latter. It seems certain that after the annual proceeds of this mine were taxed for 1917 and 1918 by the board of equalization, as they probably were, neither the mine itself nor the net annual proceeds thereof could be lawfully taxed again for those years by the taxing officers of the county. Nor does it

> seem doubtful that, if they were not so taxed by the state board of equalization, nevertheless they could not lawfully be taxed by the taxing officers of the county, because the state had vested the exclusive power to tax them in the state board of equalization."

4. There is no place here for "administrative construction."

The Circuit Court of Appeals reversed, brushing off this Kennecott question by saying:

> "For twenty-four years prior to the year in question these lands were consistently assessed in the same manner and at substantially the same amount as they were assessed here. There was no change or substantial difference in the making of these assessments, either as to procedure or valuation. The assessment in that manner over that period of time amounted to an administrative interpretation of the statute in its application to lands thus situated and used." (R. 301)

The very construction the Court below attempted to apply is itself violative of and defeated by the statutory and constitutional prohibitions hereinbefore frequently referred to.

Respondent Salt Lake County has here stipulated that although "Mining and the milling and reduction of ores is, and throughout the history of the State of Utah has been, one of the principal industries of that state, and there are many mine dumps of ores and waste, as well as tailings, in the State of Utah," still "the state taxing authorities *** have assessed no lands in the State of Utah that were occupied by tailings or other dumps other than the lands here involved owned by the plaintiff (Kennecott) and its predecessors in interest"; and that "In all other instances the several counties

of the State of Utah have assessed the lands upon which tailings and mine waste have been dumped by mine operators." (R. 101).

Kennecott's mine, mills and dump are like all others in the State of Utah, except for size. To turn a case on asserted administrative construction, when applied in the *instant case alone,* of all the mines in Utah with their dumps and millsites, appears indeed to be the epitome of judicial subservience to administrative absolutism. Kennecott's submission over the years to this species of local extortion can create no administrative practice by any definition of which we are aware.

The Supreme Court of Utah has but recently reiterated the elementary rule of construction that allied taxing statutes are not to be taken alone, but are to be considered together as parts of a plan. Union Portland Cement Co. v. State Tax Commission, 176 P. 2d 879. What is Utah's *tax plan* for ad valorem assessment of mining property? This plan is simple and unambiguous.

> "The Constitution of Utah declares (Secs. 2 and 3, art. 13) that all property in the state shall be taxed in proportion to its value, and requires the legislature to provide a uniform and equal rate of assessment and taxation of all property according to its value in money, and prescribe such regulations as shall secure a just valuation for the taxation of all property so that every person and corporation shall pay a tax in proportion to such value. * * *
>
> "The state Constitution plainly contemplates that all property, irrespective of its character, shall be taxed 'according to its value in money.' The pro-

vision with reference to the taxation of metalliferous mines does not mean to depart from this rule."

South Utah Mines & Smelters v. Beaver County, 262 U. S. 325, 67 L. ed. 1004, 43 S. Ct. 577.

As has been seen, the Utah statutes repeat and effectuate these constitutional provisions, expressly defining value to "mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor." Within that plan the State Tax Commission is empowered to assess mines and mining property; other property is to be assessed by the county in which it is located.

Against the foregoing background and in contradiction of this simple and unambiguous plan, the Circuit Court of Appeals applied what it termed an administrative construction to sustain an assessment of the site of this tailings pond, conceded to be worthless, at the sum of $286,211.00; the millsites, admitted to be of little value (being bottom land near the Great Salt Lake and rocky country at the foothills of the mountains), at $45.73 per acre (R. 100); and to sustain an assessment of the golf course by the State Tax Commission, which had no legal authority to make it. This is indeed a strange and novel conception of administrative construction, conjured up to override the clearly expressed contrary intention of statutes and constitutions alike. This assessment is a nullity because it was made with utter indifference to value, because it has not only no basis in, but is contrary to, the mandate of the statutes and Constitution of the State of Utah and the Constitution of the United States.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be granted.

C. C. PARSONS,
WM. M. McCREA,
A. D. MOFFAT,
CALVIN A. BEHLE,
Salt Lake City, Utah,
Attorneys for Petitioner,
Kennecott Copper Corporation.

JAMES INGEBRETSEN
WILLIAM W. RAY,
ATHOL RAWLINS,
J. M. CHRISTENSEN,
Salt Lake City, Utah,
Attorneys for Petitioner,
Park Utah Consolidated Mines Company.

R. J. HOGAN,
C. C. PARSONS,
Salt Lake City, Utah,
Attorneys for Petitioner,
Silver King Coalition Mines Company.

H. G. METOS,
R. J. HOGAN,
C. C. PARSONS,
Salt Lake City, Utah,
Attorneys for Petitioner,
New Park Mining Company.

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IN THE SUPREME COURT OF THE UNITED STATES

Nos...

KENNECOTT COPPER CORPORATION, a corporation,

Petitioner,

vs.

SALT LAKE COUNTY, a political subdivision of the State of Utah,

Respondent.

No...

SILVER KING COALITION MINES COMPANY, a corporation,

Petitioner,

vs.

SUMMIT COUNTY, a body corporate and politic of the State of Utah; and AGNES FARNSWORTH, as Treasurer of SUMMIT COUNTY, UTAH,

Respondents.

No...

PARK UTAH CONSOLIDATED MINES CO., a corporation,

Petitioner,

vs.

SUMMIT COUNTY, a body politic and corporate of the State of Utah; and AGNES FARNSWORTH, Treasurer of SUMMIT COUNTY, UTAH,

Respondents.

No...

PARK UTAH CONSOLIDATED MINES CO., a corporation,

Petitioner,

vs.

WASATCH COUNTY, a body corporate and politic of the State of Utah; and MARY L. GILES, Treasurer of WASATCH COUNTY, UTAH,

Respondents.

No...

NEW PARK MINING COMPANY, a corporation,

Petitioner,

vs.

WASATCH COUNTY, a body corporate and politic of the State of Utah; and MARY L. GILES, Treasurer of WASATCH COUNTY, UTAH,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO WRITS OF CERTIORARI

GROVER A. GILES
Attorney General of Utah

ZAR E. HAYES
Assistant Attorney General

CALVIN L. RAMPTON
Assistant Attorney General

EDWARD M. MORRISSEY
Salt Lake County Attorney

P. H. NEELEY
Summit County Attorney

L. C. MONTGOMERY,
Wasatch County Attorney

ATTORNEYS FOR RESPONDENT

STATEMENT

All of these cases involve simply the question as to whether or not the State of Utah, under its statutes 80-5-56 and 80-5-57, Utah Code Annotated, 1943, which statutes are set forth in the note on Page 6 of Petitioner's petition, had the authority and power to include, as a part of the net annual proceeds of the mines of the petitioners, premium or subsidy payments paid by the government as a part of the mine subsidy program adopted during the war. This is the only matter to be considered in connection with these cases, except that in the case of Salt Lake County v. Kennecott Copper Corporation there are other matters which will be discussed later in this brief.

These cases were consolidated for hearing in the U. S. District Court for the District of Utah which gave judgment in favor of the petitioners here. The matter was appealed to the Circuit Court of Appeals and that court rendered judgment in favor of the respondents, the defendants below, April 14, 1947, (R. 303-5). Petitions for Rehearing were denied October 6, 1947, (R. 359).

ARGUMENT

While these cases were under consideration by the Circuit Court of Appeals and after argument thereon, the Supreme Court of the State of Utah decided two cases involving the same identical point; namely, whether or not these subsidy payments should properly be considered by the State of Utah in arriving at the tax base upon mining properties. U. S. Smelting and Refining Company v. Phares Haynes, 176 Pac. 2d 622, and Combined Metals Reduction Company v. Tooele County, 176 Pac. 2d 630, decided January 6, 1947. Petitions for Rehearing were denied September

16, 1947. On the same date that the Utah Supreme Court handed down the decisions in the net proceeds cases above referred to, it handed down its decision in a case involving a very similar and closely related matter; namely, whether or not the subsidy payments should properly be taken into consideration by the state of Utah in connection with its so-called mine occupation tax. Combined Metals Reduction Co. vs. State Tax Commission, 176 Pac. 2d 614. Because of the fact that we feel these cases were and are determinative of the question to be considered in determining whether Writs of Certiorari should issue, they are set forth in full in the appendix to this brief.

In deciding the cases now under consideration in favor of the respondents the Circuit Court of Appeals stated:

> "One ground of the motions for directed verdicts for plaintiffs was that in the taxation of the mines and mining claims, the inclusion of subsidy payments in the gross proceeds and thence in the net proceeds, as a basis for such taxation, was not authorized by the law of Utah. That question consumes much space in the briefs and it was ably presented on oral argument. The Supreme Court of Utah quite recently considered the question and held without qualification that in the taxation of mines and mining claims in that state, premium or subsidy payments of this kind should be added to twice the amount of the proceeds received from the sale of the ores for the preceding calendar year as the base for such taxation. United States Smelting, Refining and Mining Co. v. Haynes, ——— Utah———, 176 Pac. (2d) 622. And at the same time, the court reached a like conclusion in a case involving a closely similar question. Combined Metals Reduction Co. v. State Tax Commission, ...Utah............, 176 Pac. (2d) 614. The question before us is essentially one of local law and therefore these decisions of the supreme court of the state are controlling."

It is our belief that the statement of the Circuit Court of Appeals entirely and properly sums up the matter and that the state of Utah, through its highest court having construed its statutes, which are the only statutes to be considered herein, that the matter is finally determined and should not be further considered by the Supreme Court of the United States. This court has previously recognized that the question as to whether or not the mine subsidy payments might be taken into consideration in connection with the assignment and collection of taxes in the state of Utah is one of construction of a local statute of the state of Utah. See Kennecott Copper Corporation vs. State Tax Commission, etc, 327 U.S. 573, 90 L. Ed. 862 wherein this court, in deciding that the federal courts had no jurisdiction to entertain an action brought against the State Tax Commission to recover monies paid under the Utah Occupation Tax statutes, based upon premiums or subsidy paymens, stated:

> "It is to be noted that the cases under consideration illustrate the disadvantage of deducing from equivocal language a state's consent to suit in the federal courts on causes of action arising under state tax statutes. The disadvantage referred to is that, if the merits were to be passed upon, the initial interpretation of the meaning and application of a state statute would have to be made by a federal court without a previous authoritative interpretation of the statute by the highest court of the state."

One of the reasons set forth by Petitioners as to why certiorari should be issued is that the Montana Supreme Court has held contrary to the Utah Supreme Court in connection with this matter. That statement is entirely inacurate. It is true that the Montana Supreme Court in the case of Klies vs. Linnane, 156 Pac. (2d) 183, did hold that the premium or subsidy payments could not be taken into

consideration by the state of Montana in connection with its assessment of mines or as a basis for determining the tax upon mining properties under the statutes of the state of Montana. An examination of the Klies vs. Linnane case and of the statutes of Montana will immediately demonstrate however, that the statutes of Montana are entirely different from those of Utah and that therefore there could be no conflict between the the two decisions. This certainly is not a matter of conflict between the different states in the interpretation of a common statute, but it is merely a situation where the state of Utah in interpreting its statutes has said one thing while the state of Montana in interpreting a Montana statute entirely different has said another thing. Furthermore, in the Linnane case the Montana court was bound by a previous Montana case, namely the case of Ex Rel Snidow, et al vs. State Board of Equalization, et al, 93 Mont. 19, 17 Pac. (2) 68, wherein the Montana court had held that in construing their statute relating to the taxation of mines that the words "total gross value" must be construed as meaning the market value of the product "based upon the average quotations of the price of such metals for mineral products in the City of New York."

Accordingly, these statutes being entirely different in the state of Utah and in the state of Montana it could in no sense be said that there is any lack of uniformity between the states in construing a common statute, for no common statute is involved.

We feel that the above argument and the cases referred to herein entirely disposes of the contentions which all of the petitioners might have in support of their petition for a Writ of Certiorari in so far as such relates to a construction of the statutes of Utah and as to whether under such statutes

the premium or subsidy payments might be taken into consideration in arriving at a basis for taxation of mines, or mining property.

The further contention, of course, was made that the state of Utah could not consider these subsidy payments in connection with its method of arriving at the tax base because to do so would be a burden upon the federal government and would in effect be in contravention of the due process and equal protection clauses of the Fourteenth Amendment as well as Sections 8 and 10 of Article I of the Constitution of the United States.

We feel that the reasoning of the Circuit Court of Appeals in its opinion heretofore rendered in these cases conclusively disposes of this argument. Furthermore, the matter has been previously settled by the cases of James vs. Dravo Contracting Company, 302 U.S. 134; Alabama vs. King and Boozer, 314 U.S. 1; and Smith vs. Davis, 323 U.S. 111, cited in the opinion of the Circuit Court of Appeals.

There remains then only the other questions, which are not common to all of the petitioners herein, but which relate only to the case of Kennecott Copper Corporation vs. Salt Lake County. With regards to this matter we feel that the subject was thoroughly discussed by the Circuit Court of Appeals in its decision heretofore rendered in these cases and that the reasoning and decision adopted by the Circuit Court is entirely sound and disposes of all arguments which might be raised by the petitioners in connection with this phase of the case. The opinion of the Circuit Court of Appeals is set out in full on page 295 of the Transcript of Record and hence is not further discussed herein.

SUMMARY

The Supreme Court of the State of Utah, having heretofore construed the statutes of Utah in controversy and having determined the questions all in favor of the respondents, we submit that the question is one of local law and that the decision of the Supreme Court of the state of Utah is controlling, as regards the question of inclusion of the premium payments in arriving at the basis for taxation of mines and mining properties in the state of Utah. Hence, as regards this question there should be no review by this court. That is the only question involved in the four cases other than Salt Lake County vs. Kennecott Copper Corporation.

With regard to Salt Lake County vs. Kennecott Copper Corporation case the other matters referred to therein were clearly and ably considered by the Circuit Court of Appeals and all of the matters relating thereto were determined in favor of the respondents herein. We feel that the matter was properly determined for the reasons set forth in the opinion of the Circuit Court of Appeals.

CONCLUSION

It is respectfully submitted that the Petitions for Writs of Certiorari should be denied.

GROVER A. GILES,
Attorney General of Utah
ZAR E. HAYES,
Assistant Attorney General
CALVIN L. RAMPTON,
Assistant Attorney General
EDWARD M. MORRISSEY,
Salt Lake County Attorney
P. H. NEELEY,
Summit County Attorney
L. C. MONTGOMERY,
Wasatch Couny Attorney
ATTORNEYS FOR RESPONDENT

APPENDIX

UNITED STATES SMELTING, REFINING & MINING COMPANY

vs.

HAYNES, County Treasurer.

Case No. 6931

Supreme Court of Utah

January 6, 1947

Appeal from Third Judicial District Court, Tooele County; C. E. Henderson, Judge.

Action by the United States Smelting, Refining & Mining Company against Phares Haynes, as County Treasurer of Tooele County, to recover a tax paid under protest. From a judgment for plaintiff, defendant appeals.

Reversed.

Grover A. Giles, Atty. Gen., Zar E. Hayes and Arthur H. Nielsen, Deputy Attys. Gen., and A. Pharis Johnson, Co. Atty., of Tooele, for appellant.

Cheney, Jensen, Marr & Wilkins, of Salt Lake City, for respondent. LARSON, Chief Justice.

This action involves the construction of Sec. 80-5-57, U.C.A. 1943, relative to determining the base or valuation of metalliferous mines for tax purposes. As far as pertinent to this case, the statute reads:

> Section 80-5-56. "All metalliferous mines and mining claims, both placer and rock in place, shall be assessed at $5 per acre and in addition thereto at a value equal to two times the net annual proceeds thereof for the calendar year next preceding * * *."

Section 80-5-57 defines the phrase "Net annual

> proceeds,'' and provides in part: ''The words, 'net annual proceeds,' of a metalliferous mine or mining claim are defined to be the gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores from such mines or mining claim extracted by the owner or lesee, contractor or other person working upon or operating the property, including all dumps and tailings, during or previous to the year for which the assessment is made, less the following, and no other, deductions: * * *.''

The matter resolves upon the question as to how the gross proceeds realized are to be determined. The issue grows out of the following facts: Plaintiff and respondent, hereinafter called the mine, operates a smelting and refining business and also owns and operates in the state of Utah a certain metalliferous mine called the Hidden Treasure. For the calendar year 1943, the State Tax Commission, hereinafter called the commission, fixed the net proceeds of the smelter's mine at the sum of $18,962.88, which was doubled, and a tax base fixed at $37,926. On such valuation Tooele County levied a tax for the year 1944 in the sum of $667.50, which amount was paid under protest and this action instituted against defendant as County Treasurer, hereinafter called the county, to recover the amount so paid.

During the present World War, and to prevent or control inflation, the Federal Government set up Office of Price Administration, which fixed or prescribed ceiling prices on the sale of many articles including metals. Finding it necessary or advisable to increase the production of certain strategic metals without disturbing the price structure, the government set up the Metal Reserve Company to carry out a plan jointly arranged by the War Production Board and the Office of Price Administration designed to increase the output of such metals. This plan provided for the fixing of

certain quotas of production for non-ferrous metal mines, and permitted the Metal Reserve Company to pay to the producer of metals a fixed subsidy or "premium payment" per pound over and above the O.P.A. ceiling price for metals produced by the mine in excess of its fixed quota. These payments were designed to encourage and make possible the mining, extraction and refining of submarginal ores which otherwise would not be "pay-dirt." They were paid to the producer by the Metal Reserve Company monthly upon certificates from the smelter showing the quantity of the various metals, over the assigned quota, delivered to the smelter from the mine.

Under the facts as stipulated in the trial court, the commission included in the gross proceeds of the mine the premium payments made by the Metal Reserve Company for over-quota production. Had these premium payments not been included in the computation of gross proceeds, there would have been no taxable net proceeds. The mine contends these payments were bounties or subsidies and not proceeds realized from ores extracted from the mine. The sole question for our determination is: Are premium payments to be included in computing gross proceeds realized from ores extracted from the mines within the meaning of Section 80-5-57, U.C.A. 1943? The argument hinges upon the meaning of the phrase "*The gross proceeds realized * * * from the sale or conversion into money or its equivalent of all ores from such mine * * * extracted by the * * * person working upon or operating the property.*"

The county argues that these words cover and include all moneys received from, or on account of, the extraction of metalliferous ores which have been sold or rendered and converted into such conditions that its monetary value is readily ascertainable. The mine contends that the words include only

money or its equivalent received from a purchaser as the price the purchaser pays for the metals sold to it by the mine. In examining the expression, we first note the word *proceeds.* Perhaps the best definition is that given by the Nebraska court in State ex rel Ledwith v. Brian, 84 Neb. 30, 120 N.W. 916, 917 where it is defined as "the amount proceeding or accruing from such possession or transaction"—the "yield, issue product." The Texas court in Ladd v. Upham, Tex. Civ. App. 58 S.W. 2d 1037, 1039, quoted with approval the foregoing definition and added the words "income, receipt, or return." Valuation is figured on the proceeds realized. Money, property or profits realized usually means brought into possession. Lorillard v. Silver, 36 N.Y. 578. The word does not include paper profits or estimated profits. Taylor v. Commissioner of Internal Revenue, 7 Cir., 89 F. 2d 465. *Realize* is usually used in contrast to "hope" or "anticipation." Lorillard v. Silver, supra. But it need not be "cash in hand" to be realized gain or income, since for taxation purposes income is "received" or "realized" when it is made subject to the will and control of the taxpayer, and can be, except for his own action or inaction, reduced to actual possession. Loose v. United States, 8 Cir., 74 F. 2d 147, 150. Taxes assessed and payable in one year, but not actually collected until the next year are nevertheless revenues "realized" as of December 31st of the year assessed within a statute providing that revenues realized for the first year should be applied to certain indebtedness. Houston County v. Peach County, 168 Ga. 813, 149 S.E. 219, 220. When a taxpayer obtains money by issuing an obligation which he later discharges for less than face value, taxable gain exists, since money need not be sold or exchanged to be "realized." Commissioner of Int. Rev. v. American Chicle Co., 2 cir., 65 F. 2d 454. And where corporation bought assets of another corporation, and assumed payment of seller's bonds, differences

between face of bonds purchased in 1922, 1924 and 1925 and sums less than face paid therefor were taxable as "realized gains" absent proof that the buyer suffered a loss on the whole transaction. Helvering v. American Chicle Co., 291 U.S. 426, 54 S. Ct. 460, 78 L. Ed. 891. When used in connection with the conversion of claims or demands into money "realize" is a very broad term. Bettiner v. Gomprecht, 28 Misc. 218, 58 N.Y.S. 1011, 1013.

(1) We conclude that "the gross proceeds realized" as used in this section of the statute, means the total or whole amount in money, or other things of value, that has been received or which the owner may receive or take possession of at his pleasure, or to which he is entitled on demand, and which accrues to him from the sale or conversion into money or its equivalent of ores extracted from the mine or mining claim.

Are the "premium payments" money received from a sale or conversion into money or its equivalent of ores extracted from the mine or mining claim? That the "premium payments" are tied tight to ores extracted from a mining claim is not disputed, nor could it well be. These payments are made only on the metals produced from a mine or mining claim over the assigned quota. But the statute confines the tax base to proceeds realized from: (a) a sale of ores or metals; (b) a conversion of ores or metals into money or the equivalent of money. We consider them in the reverse order.

(2, 3) Premium payments apply only to ores shipped to the smelter or reduction works. They are made on the basis of the determined metal content of the precipitates and concentrates delivered to the smelting company. In other words, the premium payments are made only on and when the ores extracted from the mine are converted into con-

centrates or bullion where the quantity of the various metals is readily determinable and the value thereof easily computable. When the extracted ores have been converted or refined into metals in such form that they have a ready market at definite or readily determinable prices so that at any time the miner can dispose of them and receive the money therefor, they have been converted into the equivalent of money, and are to be included in the computation of gross proceeds for the purpose of fixing valuation or tax base. Salt Lake County v. Utah Copper Co., 10 Cir., 93 F. 2d 127 (certiorari denied 303 U.S. 652, 58 S. Ct. 750, 82 L. Ed. 1112). See also Sec. 80-5-59, U.C.A. 1943; Mercur Gold Mining & Mill Co. v. Spry, 16 Utah 222, 52 P. 382. But in fixing the value or monetary equivalent of the refined metals bullion or concentrates for determination of the gross proceeds, are the premium payments to be included as part of the proceeds realized from ores extracted from the mine? There can be question but that these premium payments accrue to the miner from the converting, or rendering, into a marketable condition (the equivalent of money) of ores extracted from the mine. They are therefore "proceeds realized" from ores extracted from such mine. And since the tax base or valuation is fixed from the gross, total or whole proceeds so accruing, these payments must be included in computing the gross proceeds realized.

Are they moneys received from a sale of ores or metals? These ores or metals belonged, and as far as the record shows, still belong to the miner. If such is correct, there never was a sale, and these moneys could not be received from a sale of the ores or metals. But if the fact be that these ores or metals extracted therefrom were or have been sold, then under our decision in Combined Metals Reduction Co. v. State Tax Commission, Utah, 176 P. 2d 614, these payments

would constitute part of the proceeds received from a sale, and properly be a part of the gross proceeds realized. The writer dissented from the opinion in that case and expressed his views therein. However, while the opinion stands it binds the writer, as well as the bar and laymen, and I accept it as the law of this jurisdiction. It follows that whether the metals have been sold or retained by the miner, the premium payments are part of the gross proceeds realized from ores extracted from the mine, and are to be included in computing the tax base or valuation of the mine for tax purposes.

The miner contends that the inclusion of these premium payments in the computations was taxation of the means used by the Federal Government in the prosecution of the war and was a direct levy on the activities and facilities of the federal government. No tax is levied under these proceedings against any federal agency nor against any funds paid by such agency.

The statute involved prescribes a rule for determining the valuation of mines for assessment purposes. The gross proceeds realized are mere units considered in the formula for measurement of assessable value.

The test is well stated in Helvering v. Claiborne-Annapolis Ferry Co., 4 Cir., 93 F. 2d 875, 876, wherein an exemption from taxation was claimed on moneys paid as "A contribution by the state towards the maintenance of the public ferry." This contention was rejected by the court:

"On the second question, there can be no question but that the operation of a public ferry as a link in the state highway system is a proper function of the state and that the proceeds of such operation by the state itself would not be subject to the federal income tax (Jamestown & Newport Ferry Co. v. Commissioner, 1 Cir., 41 F. 2d 920); but it by

no means follows that the income of a private corporation engaged in operating such a ferry would not be subject to such tax. Cf. Susquehanna Power Co. v. State Tax Commission of Maryland, 283 U.S. 291, 293, 51 S. Ct. 434, 435, 75 L. Ed. 1042; Broad River Power Co. v. Query, 288 U.S. 178, 181, 53 S. Ct. 326, 327, 77 L. Ed. 685; South Carolina Power Co. v. South Carolina Tax Commission, D.C., 52 F. 2d 515, 526. Nor is the payment made by the state to a private corporation necessarily exempt from such tax because made as compensation or part compensation for a service which the state itself might have performed. Metcalf & Eddy v. Mitchell, 269 U.S. 514, 46 S. Ct. 172, 174, 70 L. Ed. 384; Underwood v. Commissioner, 4 Circ., 56 F. 2d 67."

The leading case on this subject is James v. Dravo Contracting Co., 302 U.S. 134, 58 S. Ct. 208, 211, 82 L. Ed. 155, 114 A.L.R. 318. West Virginia, imposing a tax of two percent upon the "gross income of the business" of any person engaged in the business of contracting, included in taxpayer's "gross income" the amounts received by him from the Federal Government for the construction of locks and dams upon Federal property in the state. The Supreme Court of the United States in holding such tax valid stated:

"The tax is not laid upon the government, its property, or officers. Dobbins v. Commissioners, 16 Pet. 435, 449, 450, 10 L. Ed. 1022.

"The tax is not laid upon an instrumentality of the government. McCulloch vs. State of Maryland, 4 Wheat. 316, 4 L. Ed. 579; Osborn v. Bank of the United States, 9 Wheat. 738, 6 L. Ed 204; Gillespie v. (State of) Oklahoma, 257 U.S. 501, 42 S. Ct. 171, 66 L. Ed. 338; Federal Land Bank (of New Orleans) v. Crosland, 261 U.S. 274, 43 S. Ct. 385, 67 L. Ed. 703, 29 A.L.R. 1; Clallam County, (Wash.) v. United States, 263 U.S. 341, 44 S. Ct. 121, 68 L. Ed. 328; People of

(State of) New York ex rel. Rogers vs. Graves, 299 U.S. 401, 57 S. Ct. 269, 81 L. Ed. 306. Respondent is an independent contractor. The tax is nondiscriminatory."

Answering the contention of the taxpayer that the tax increased the cost to the government of the services rendered, the court stated: "But if it be assumed that the gross receipts tax may increase the cost of the government, that fact would not invalidate the tax."

This assessment of the mine is not a tax on the Federal Government nor upon its agencies or facilities. The federal statutes and regulations empowering these premium payments made no pretense at exempting them from the state assessment formula. See Ford J. Twaits Co. v. Utah State Tax Commission, 106 Utah 343, 148 P. 2d 343.

(5, 6) It is urged that to include these premium payments in "proceeds realized" for the purpose of determining the valuation of the mine for assessment purposes, would violate the constitutional requirements as to uniformity of assessment and taxation as required by Sections 2, 3 and 4 of Art. XIII, Constitution of Utah, and Section 8 of Art. I, and Section I of the Fourteenth Amendment to the Constitution of the United States. The Utah Constitutional provisions are as follows:

"Sec. 2. All tangible property in the State, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law * * *."

"Sec. 3. The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all tangible property in the State, according to its value in money, and shall prescribe by law such regulations as shall secure a just valuation for taxation of such property, so that every person

and corporation shall pay a tax in proportion to the value of his, her, or its tangible property * * *."

"Sec. 4. All metalliferous mines or mining claims, both placer and rock in place, shall be assessed as the Legislature shall provide."

It will be observed that these provisions require that all tangible property, including metalliferous mines, shall be subjected to a uniform and equal rate of assessment according to its value in money. The method or yardstick by which the valuation in money is to be determined shall be prescribed by the legislature. It is not required that the same yardstick or method of determining value shall be used with respect to all kinds of property. But the different formulae which may be applied to different kinds of property must be such that they aim and tend to secure for assessment purposes a valuation fair and equitable in comparison with and commensurate with the valuation of other kinds of property. When the valuation thus secured is such that if the uniform and equal rate of taxation is applied to the valuation the property is taxed in the same proportion to its value as is all other tangible property, the method of arriving at the assessed valuation is not subject to constitutional objections as violative of Article XIII. It is conceded that the statutory method of valuing metalliferous mines for taxation purposes at $5 per acre plus a multiple or sub-multiple of the net proceeds is a proper and constitutional formula for determining the value of the mines for assessment purposes. See South Utah Mines & Smelters v. Beaver County, 262 U.S. 325, 43 S. Ct. 577, 67 L. Ed. 1004; Mercur Gold Mining & Milling Co. v. Spry, 16 Utah 222, 52 P. 382; Salt Lake County v. Utah Copper Co., 10 Cir., 294 F. 199; Tintic Standard Mining Co. v. Utah County, 80 Utah 491, 15 P. 2d 633; Byrne v. Fulton Oil Co., 85 Mont. 329, 278 P. 514. But it is argued that to

include premium payments in the gross proceeds of mines violates the rule because: (a) It amounts to a classification of mines into different groups for taxation purposes. (b) In determining the value of the mine in 1944, it takes into consideration the production of the mine in 1941 as well as the proceeds in 1943. (c) The value of the mine would be based inversely upon the production quotas fixed by the government instead of upon the net proceeds. (d) It amounts to fixing values upon gross costs rather than upon net proceeds. The arguments to sustain these points are rather abstruse and tenuous. Instead of analyzing and answering each argument, we shall consider the basic question and therein dispose of all points raised.

The matter involved in this case is not the price received from copper lead or zinc; it is not the quantity of ore mined nor the cost of mining same; it is not the quotas fixed by the government nor the reasons for such quotas. The only matter involved is the valuation for assessment purposes of the mine on January 4, 1944. That value is fixed by statute at $5 per acre plus two times the net proceeds. In Combined Metals Reduction Co. v. State Tax Commission, Utah, 176 P. 2d 614, decided January 6, 1947, we held that the premium payments were moneys received for metals mined and extracted from the mine. That such money becomes a part of the gross receipts from the mine is settled by that decision unless such inclusion infringes the uniformity clause of the Constitution. Use of proceeds as a basis for determining valuation for taxation purposes has been used not only for mines but railroads, motor carriers and other public utilities. The uniformity clause, when applied to formulae based upon proceeds, does not require that all individuals or companies within the class to which the formula is applied have the same income or the same sources of obtaining their proceeds but merely that the rule for computation of proceeds

apply alike-uniformity-to all within the class to which the proceeds formula applies. If as to all metalliferous mines the gross income is computed by taking all income received from the production and extraction of metals from the mine, then the application of the rule is uniform. From this is deducted certain costs allowed by the statute and the remainder is the net proceeds used in determining the tax base. In the Mercur Gold Mining case, supra (16 Utah 222, 52 P. 384), this court said: "By the term 'net annual proceeds of the mine' is meant what is annually realized from the product of the mine, over and above all the costs and expenses of obtaining such proceeds and converting the same into money."

Because one mine, whether because of more efficient management, better mining equipment, stoping up for ores as distinguished from hoisting from low levels, shorter hauls, richer ores, or better smelter contract, has larger net proceeds per ton of ore mined than has another, mining the same kinds of metals, does not make the assessments discriminatory nor does it result in lack of uniformity. It does result in assessing one mine at a greater value than the other because it has a greater net return, a greater *profit*, more dividends, and that is an important item in the determination of value of mining property. A somewhat similar question arose in a case involving a California gross receipts tax levied on all companies "owning, operating, or managing automobile, truck" and other carrier lines. The annual gross receipts were considerably higher than the replacement value of the property owned and used in the operations. These high receipts resulted from a very lucrative government mail carrying contract. The point was urged that the value should be fixed independent of this contract; that is, at what another person without the mail contract could earn from the property. The Supreme Court of the United States (Alward

v. Johnson, 282 U.S. 509, 51 S. Ct. 273, 75 L. Ed. 496, 75 A.L.R. 9 (upheld the right of California to collect the tax.

State v. Great Northern R. Co., 174 Minn. 3, 218 N.W. 167, 169, involved the Minnesota law basing assessment of railroads on their gross earnings. The law was assailed on the ground that it might result in a higher tax on one railroad than on another, although the cost of building and replacing the roadbed of each would be the same. The court said: "The taxing authorities must take gross earnings as they find them. They do not fix earnings * * *. Large earnings give value, and the road has a unitary value which cannot be disregarded because one mile costs for construction more than other * * *. The property of the railroad is taxable at its value as a going concern. The ore traffic originates in Minnesota. The rate is not unduly competitive. The road which has the privilege of carrying the ore, whether through direct ownership or indirect ownership or control through subsidiaries, or through contracts with mines in which it is not interested, makes the earnings. No other could. Without such ownership or control or contracts ore-carrying roads would not have their present value nor make their present great earnings. We cannot see that the statutory scheme of taxation is unconstitutional or that the tax which it imposes works a hardship upon the defendant through an excessive valuation. Such earnings give the defendant's property great value which reflects itself in taxes."

To a charge that a tax levied on the basis of mining royalties was violative of the constitutional requirements for equality of taxation, the court turned a deaf ear in Fraser v. Vermillion Mining Co., 175 Minn. 305, 221 N.W. 13 (appeal dismissed 278 U.S. 572, 49 S. Ct. 93, 73 L. Ed. 512).

The Montana court was confronted with the same arguments as are made here with respect to the application of

the uniformity of assessment clauses of the Constitution. That case, Anaconda Copper Mining Co. v. Junod, 71 Mont. 132, 227 P. 1001, did not involve "Premium Payment" but did involve the computation of net proceeds. The court held the constitutional requirements of uniformity and equality were not violated because some mines had bigger incomes or smaller expenses on the same mining operations.

Let us note now the position of the mine. It seeks to exclude from "pross proceeds" the premium payments, but insists on deducting from the gross proceeds, without premium payments included, all the costs involved in mining, extracting and smelting the metallic ores on which the premium payments were made. The following figures, taken from the mine's brief, show the inequality that would result if their position were upheld. The Chief Consolidated Mining Company in 1943 received as gross proceeds, as it would have them construed, limited to smelter returns, the sum of $125,-227.92. In addition thereto the Chief Consolidated received from the government premium payments for said metals in the sum of $492,238.84, which the state seeks to include in "gross proceeds." The company received as a result of its mining operations $617,466.76. The mine seeks to deduct the costs of producing ore which nets the company $617,466.76 from the smelter returns of $125,227.92 to obtain the net proceeds for tax purposes. Another illustration: The Hidden Treasure Mine, involved in this action produced smelter returns of $144,693.74 and received premium payments of only $24,489.40 or gross receipts from its mining operations of $169,183.14, the costs of producing which would be deducted from $144,693.74. The mine does not give us the mining costs, but assuming they were equal per ton at the two mines, you would have the following anomalous figures: For every $169 received by the Hidden Treasure, it would be taxed on $144, while the Chief Consolidated for every $492 received

would be taxed on $125. Computing over onto the same amount in dollars as tax base, for every $144 used in tax base and for which the Hidden Treasure received $189, the Chief Consolidated would receive $560.88. Certainly this would not be uniformity and equality in taxation.

On the other hand the method used by the Tax Commission tends to equalize and render uniform the tax base and assessment. We find no valid constitutional objection, state or federal, to the computation of the tax base as used by the Tax Commission.

Judgment reversed. Costs to appellant.

McDONOUGH, WADE, and WOLFE, JJ., concur.

PRATT, Justice (dissenting).

In do not agree that a bonus, a premium, a subsidy-call it by any name—given as an inducement for extra production, is, in any sense, a measure of value, either of the article produced or of the unit that produced it. I am convinced the Legislature gave no consideration to such inducements in enacting the law in question.

Assume mine "A" produced in 1941 as its quota 300 tons of ore. For all over that amount produced in 1943 it receives a higher price—why? Not that those particular excess tons were more valuable than the others—the excess tons were not earmarked in that way. The higher price for the excess was for the extension of the mine's facilities to greater production. The increase in price was consideration for production services, measured in price per pound of ore.

Value is the power an article itself confers upon its possessor to command, in exchange for itself, the labor or the product of labor of others. A prospective purchase of mine "A" would not consider the willingness of the government to pay a premium for extra production an element of the

value of the mine or of its ore. Rich ore available at low cost would not mature the purchaser's right to ceiling price plus subsidy. That right would mature only with specified production. The right is not contingent upon the kind of ore, but upon the amount of production. Production, not ore, is the foundation—the consideration for the premium.

What did the Legislature have in mind when it enacted the sections of our law in question? They were seeking a formula for establishing the commercial value of the mines. An estimate of that value could not be made by merely looking at the mine—no one knew what was underground. They concluded that the best method of estimating that value was upon its ore value. Its ore value was evidenced by the proceeds of that ore. In effect they adopted this ore value as the unit of measure, and then established the formula for its use.

It may be that due to war conditions, ceiling prices, or other legal restrictions the true commercial value of that ore was not, as a practical matter, realized; but the formula did not change as a result. The Legislature was not thinking in terms of emergency conditions, and did not make any provision for expanding that formula to include income of a nature other than that of ore value—such as income from the rendition of extra production services.

In furtherance of the war effort the government expended vast sums for production. Many of the articles produced possessed little or no commercial value, although they were important war assets. One cannot reason from war expenditures to commercial values with any degree of accuracy or logic. I don't think the Legislature attempted any such reasoning.

COMBINED METALS REDUCTION CO.,
Respondent

vs.

TOOELE COUNTY, a body corporate and politic of the State of Utah, and Phares Haynes, as Treasurer of Tooele County, Utah,
Appellants.

Case No. 6907

Supreme Court of Utah

January 6, 1947

Appeal from Third Judicial District Court, Tooele County: C. E. Henderson, Judge.

A. Pharis Johnson, City Atty., of Tooele, Zar E. Hayes and Arthur H. Nielsen, Deputy Attys. Gen., and Grover A. Giles, Atty. Gen for appellants.

Herbert Van Dam, Jr., of Salt Lake City, for respondent.

LARSON, Chief Justice.

This is a companion case to United States Smelting, Refining & Mining Co. v. Phares Haynes, County Treasurer of Tooele County, decided this day, Utah 176 P. 2d 622. The essential facts are the same and the issues present the same question, The only essential difference is that here judgment was entered on the pleadings, while in that case evidence was taken. Since there is no essential difference in the facts and the issues are the same, the results must be the same. Upon the conclusions reached in that case, the judgment herein must be reversed. It is so ordered. Costs to appellants.

McDONOUGH, WADE and WOLFE, JJ., concur.

PRATT, J., dissents for the reasons stated in his opinion in United States Smelting, Refining and Mining Company v. Phares Haynes, as County Treasurer of Tooele County.

COMBINED METALS REDUCTION CO. et al

vs.

STATE TAX COMMISSION, et al (ten other cases).

Nos. 6869-6879

Supreme Court of Utah

January 6, 1947

Appeal from Third Judicial District Court, Salt Lake County; M. J. Bronson, Judge.

Actions by Combined Reduction Company, Eureka Lilly Consolidated Mining Company, Tintic Standard Mining Company, Colorado Consolidated Mining Company, Chief Consolidated Mining Company, Montana Bingham Consolidated Mining Company, United States Smelting, Refining & Mining Company, Eureka Bullion Mining Company, International Smelting & Refining Company, National Tunnel & Mines Company, and the Ohio Copper Company of Utah against the State Tax Commission and others to recover occupation taxes paid under protest. From judgments for plaintiffs, defendants appeal.

Reversed.

Grover A. Giles, Atty. Gen., Zar E. Hayes and Arthur H. Nielsen, Deputy Attys. Gen., W. L. Skanchy and Wayne L. Christoffersen, both of Salt Lake City, for appellants.

Herbert Van Dam, Jr., Ingebretsen, Ray, Rawlins & Christensen, Cheney Jensen, Marr & Wilkins and Farnsworth & Van Cott, all of Salt Lake City for respondents.

Wade, Justice.

Appeal by the State Tax Commission from judgments entered against it in favor of the mining companies, the respondents herein.

Each of the mining companies had filed a complaint against the Tax Commission to recover occupation taxes paid under protest for the year 1943. The issues in all the cases being the same they were consolidated for trial. The cases were submitted on written stipulations of the facts and the court's findings and conclusions were based on these stipulations.

During the course of this last war, our federal government found it necessary in order to prevent hoarding, price spiraling, inflation and profiteering due to the great demands of the war upon our natural resources, to set up an Office of Price Administration, a Federal agency, whose duty it was to maintain price stability and prevent undue price rises. This agency established certain maximum price schedules on commodities and it became unlawful to buy or sell any commodity above the "ceiling price" by the OPA.

In August of 1941, in pursuance of this policy, the OPA established a price schedule on metals. It soon became apparent that under this price schedule there would be an insufficient production of metals because a great many mining companies would not be able to operate at a profit and as a result our war effort would be hampered. In view of this and in order to facilitate the greatest possible production of copper, lead, and zinc, the War Production Board and the OPA announced a "premium plan" whereby the Metals Reserve Company would pay a premium or bonus for the production of all copper, lead and zinc in excess of quotas which it would establish for each producer. Although the Metals Reserve Company was authorized to buy directly from producers at higher prices than those established by the OPA, none of the mining companies here involved sold its metals to it but sold to private industries at the maximum prices allowed by the OPA regulations and then received "premium payments" from the Metals Reserve Com-

pany under the "premium payment plan" for all metals which were produced in excess of the quotas assigned to each Company respectively.

The State Tax Commission in making its assessments under the mining occupation tax statute which provides that mining companies must pay "an occupational tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold" included the "premium payments" received by the respective mining companies from the Metals Reserve Company. The companies objected to this inclusion in the assessment and paid under protest that part of the tax which was based on these "premiums," and then filed suits in the district court to recover these taxes. The district court found in their favor.

Whether the "premium payments" made by the Metals Reserve Company for the production of metalliferous ores in excess of quotas allocated to each company was properly included in determining the taxes due involves a construction of Sec. 80-5-66, U.C.A. 1943, which reads in part as follows:

"Except as herein otherwise specifically provided, every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold which tax shall be in addition to all other taxes provided by law * * *.

"The basis for computing the occupation tax imposed by this act for any year shall be as follows:

"(a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, * * * operating the mine or mining claim from the sale of all ores or metals during

the calendar year less a reasonable cost, if any, of transporting the ore from the place where mined to the place where, under the contract of sale, the ore is to be delivered.

"(b) If the extracted ore is treated at a mill, smelter or reduction works which receives ores from independent sources and which is owned or controlled by the same interests owning or controlling the mine or mining claim, such disposal shall be treated as a sale within the meaning of this section for the purpose of determining gross proceeds or otherwise, * * *."

(1, 2) Appellants contend the court erred in holding that the "premium payments" made by the Metals Reserve Company to the mining companies for production in excess of quotas allocated to each respectively were not properly included in determining the amount of the occupation taxes assessed, because the basic purpose of the statute is to levy an occupation tax "Equal to one per cent of the gross amount received for or the gross value of metalliferous ores sold" and these payments were part of the gross amounts received for ores sold. They argue that although the statute provides "yardsticks" or "measuring rods" by which this amount can be determined, that nevertheless, these yardsticks apply only to cases which come clearly within their scope. That the mining companies do not come within the scope of subsec. (a) which is the standard the mining companies contend should be used because all the metals produced, the value of which is involved in these cases, were sold to independent companies, because there could be no bona fide sales in view of the fact that the government controlled prices and distribution of products and there was no free, competitive market in which the mining companies could sell, nor were there purchasers who could buy without restraint. We cannot agree with this reasoning. Webster's New International Dictionary defines "bona fide" as being "in or with good faith; without

fraud or deceit * * *." The mere fact that the conditions under which contracts of sale are made are regulated by a government does not mean that the contracts are not entered into in good faith and are not bona fide contracts of sale.

Appellants further contend that even though subsec. (a) should be considered the yardstick by which the commission must determine the taxes in these cases, nevertheless, the sale prices paid by the private industries under their contracts are not the sole criterion in fixing these taxes; that subsec (a) should be so construed as to give effect to the intent of the act which is that the tax should be based on the gross amount received for or the gross value of the ores sold, and since subsec (a) provides that the yardstick should be the money or its equivalent actually received by the owner from the sale, the "premium payments" were properly included because the mining companies actually received for the ores sold the "premium prices" as well as the purchase prices paid by the private industries under their contracts of sale.

We are of the opinion that if the "premium payments" made by the Metals Reserve Company were actually paid for ores sold that it was proper to include these payments in determining the assessments for the occupation taxes as the statute does not specifically limit the base to be used in such assessments to the purchase prices paid under bona fide contracts of sale but rather bases it on the amounts actually received where ore is sold under bona fide contracts of sale.

Respondents argue that the "premium payments" were not given for ores sold but were bonuses or subsidies given by the government to encourage the production of ores and did not affect the value of the ores, which value was ascertain-

able from the prices paid under the contracts of sale. Appellants urge that although the government was induced to make these premium payments because of the necessity of obtaining the greatest possible production of metals needed for the war effort and that the prices established by the OPA made it impractical to mine submarginal ores, that nevertheless, these premium payments were intended as further consideration for the metals sold, and they offer as proof of this the fact that the "premium prices" were included in the general price schedule fixed by the War Production Board, the Office of Price Administration and the Federal Loan Administrator, and also that it was considered necessary by these agencies to exempt these premium payments from the maximum price regulations established.

We are of the opinion that there is merit to appellants' contention. Although the "premium payment" plan was evolved for the purpose of making it possible to mine submarginal ores and to develop additional ore reserves and thus obtain production of urgently needed ores in our war effort, which production would not have been possible under the ceiling prices set for metals by the OPA, and although the mining companies could not get premium prices on all metals produced and sold by them, but only on those metals produced after the quotas which was allocated to each respectively had been fulfilled, nevertheless, the premium prices were paid only for such metals as were not only produced in accordance with the requirements of the plan, but which were also sold. This appears to us to be significant as indicating an intent on the part of the United States government to allow the payment of higher prices for certain metals sold and yet avoid a break in its program to avoid inflation. We base our conclusion that premium payments were made for ores sold and not for the mere production of such ores upon part of a joint statement issued in Febraury of 1942, by the

War Production Board and the Office of Price Administration, wherein it is stated: "Premium payments will be based upon metal *paid* for under the terms of settlement contracts. Quotas, of course, will be fixed on the same basis. If no settlement contracts exist, quotas and premium payments will be computed on the basis of 95, 90 and 85 per cent of the metal content in the case of copper, lead and zinc, respectively * * *." (Italics ours). It is self-evident that metals are not paid for under settlement contracts unless such metals are sold.

Since it appears that the "premium prices" paid to the mining companies are for metals sold by them, and since our occupation tax statute provides that the basis for determining the amount of taxes due where there has been a sale of metals under a bona fide contract of sale is "The amount of money or its equivalent actually received * * * from the sale * * *." It is our opinion that the lower court erred in holding that the "premium payments" received from the Metals Reserve Company should not have been included by the Tax Commission in determining the amounts due.

Reversed.

McDONOUGH, J., concurs.

WOLFE, Justice.

I concur in both the results and the reasoning of the main opinion. Because it is argued that "the amount of money actually received * * * from the sale of ores" is that which alone comes out of the pocket of the purchase, I deem it helpful to supplement what has been said in the opinion by a further analysis.

It must be kept in mind that the tax imposed in this case is not one on the sale of ore or metal but one on the privilege of mining. The taxable event is the engaging in the occupa-

tion of mining. The fact that there is an exemption from the tax upon companies receiving less than $20,000 in gross value of ore does not make it less so. The very act was denominated "Mining Occupation Tax." The tax is imposed except as specifically otherwise provided on "Every person engaged in the business of mining or producing ore," etc. The remainder of the first paragraph of Sec. 80-5-66, U.C.A. 1943, deals with the measuring rod—to wit: a "Tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold," etc. In view of the purpose to impose a tax on the privilege of engaging in the business of mining which business was the taxable event to which the tax was incident, I do not think it unreasonable to construe both the first paragraph and subparagraphs (a), (b) and (c) of the second paragraph of Sec. 80-5-66 as making the event of a bona fide sale during the calendar year the occasion which made the tax applicable, leaving still open the question of what amounts of money received for or on account or by reason or by virtue of the sale were to be the measure of the tax. That would make the payability of the tax depend on getting the ore produced in the channels of commerce. Thus we are not relieved from the necessity of determining whether the basis for computing the tax should or should not contain the moneys received under the "price-premium plan." I realize a good case can be made for excluding as well as including moneys received from that source but I think the conclusion arrived at by Mr. Justice Wade is more in accord with the realities of the situation than that of Mr. Chief Justice Larson and does no violence to the language of Sec. 80-5-66, U.C.A. 1943, and is in harmony with what I believe to be the intent of the legislature.

As to the realities: It is well known that the basic metals of copper, lead and zinc were indispensable to a successful prosecution of the war; that they were needed in great quan-

tities for that purpose; that the government was for all practical purposes the sole customer for these metals; that ceiling prices were necessary to resist inflation and thus prevent a great increase in the cost of war to the taxpayers; that if ceiling prices were alone resorted to for this purpose they would need to be placed at a point where the marginal high cost producer could continue to produce which would inordinately increase the profits of the low cost producer. A plan was, therefore, devised which would, in effect, give different prices to economically differently situated mines for the metal in their ores. And this was known as the "premium price plan." The very title of the plan is significant. Mines were to be paid different prices for their ores depending on the quotas assigned to them, which in turn depended on their production costs. The fact that part of the price came from the smelter and part from the government or all from the smelter if it used the authority it had to pay the premium price, the latter to be reimbursed for part of the expenditures, or all from the government as in the cases when the Metals Reserve Company brought the ores directly, would make no difference as to the *prices* received by the different mines. In many cases the higher cost mines were given zero quotas and were paid premium prices on all ores mined and placed into commerce, that is "sold"; and some of the zinc producers received even three different prices, being under "B" and "C" classifications and having an "A" quota of zero. In reality there was no free market and there were various premium prices paid for the same metals produced by mines economically differently situated. The fact that there was a ceiling plus the fact that all ores going to the smelters received these ceiling prices plus, in case they exceeded their quotas, additional or premium prices plus the fact that practically the entire output went to the government, made the real situation one

where the smelters were in effect buying the ore from the mines for the government, paying ceiling prices for the metal content, the Metals Reserve Company adding a premium price where applicable. The smelters were also reimbursed by the government for the ceiling prices which they paid to the mines in that the government in turn took the metal off their hands at the ceiling prices. The profits came to the smelters in the reduction charge made to the mines if it was smelted on a toll basis or, as in most cases, the reduction fee plus the percentage of metal taken as a part of the smelter's remuneration if it were taken on a contract basis. But the price paid to the mines was in reality the ceiling price plus whatever premium price was applicable, if any.

That the so-called subsidy was in fact considered as an additional price for the metal in the ore is borne out by the fact that at first it was announced that the Metals Reserve Company would pay as an over all price the ceiling plus the premium prices for domestic ores where production exceeded quotas which were to be fixed. But under the Emergency Price Control Act the Metals Reserve Company could not sell for any more than the maximum price established. Hence, if the Metals Reserve Company had paid respectively 17c for copper, 11c for lead and 9¼c for zinc it would have been required to have them smelted on a toll basis and then sold to the fabricator for 12c, 6½c and 8¼ per pound respectively for copper, lead and zinc. While the ultimate outlay to the government would have been substantially the same, it was simpler to have the mills or smelters pay only ceiling prices for the metals, the Metals Reserve Company paying the producer the premium price if applicable. But even this method required a change in the regulations of the Office of Price Administration in May, 1942. This was immediately after setting up the "premium price plan." The change in the regulation required sales of copper, lead, and zinc or ores

containing such metals to smelters at ceiling prices but permitted Metals Reserve Company, "pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board and the Office of Price Administration," to pay the premium price or subsidy and provided that it "should exempt from the maximum regulation." There should be little doubt, then, that the extra amount paid for metal in over quota ores is part of a price.

I do not think, as I shall point out below, that it makes any difference in the interpretation of Sec. 80-5-66 whether the amount paid by the Metals Reserve Company is called a premium price or a subsidy payment. In this part of my opinion I am attempting to meet the plaintiffs on their own ground, to wit, that moneys actually received from ore sold is the price or amount paid by the immediate purchaser, that is the mill or smelter. I am attempting to show that the price paid is a ceiling and a premium price even though they may directly come from two different sources. While reasons or motive for devising a plan or scheme ordinarily will not determine its legal nature, the reasons which actuated the plan may throw much light on the legal significance of the transactions or steps which are necessary for its working. Undoubtedly the reason for the Premium Price Plan was to keep the marginal mines in operation without material increase in ceiling prices. With our rapidly diminishing supply of known non-ferrous ores in place it might be a wise policy of the government to subsidize marginal mines even in peace times at least to the point where production of going mines would not be abandoned because of cost. Abandonment of a mine may result not only in postponement of production to a later age but in absolute loss of the ore. If a premium price were given to conserve ores by getting them out of the ground in cases when abandonment and collapse of a mine might permanent-

ly render their recovery impossible so as to stock pile them instead of getting them into commerce for present use, the motive might be somewhat different but legal nature of the transactions involved in the same plan as was in this case adopted would be the same.

The Intent of the Legislature:

Undoubtedly the legislature at the time of the passage of the Occupation Mining Tax Law (Chap. 101, Session Laws 1937, now Secs. 80-5-65 to 82, U.C.A. 1943) did not envisage a war, consequent price ceilings and premium prices. It intended to impose a tax on the privilege of mining ore and it made the measure of that tax a sum equal to one per cent of the gross amount received for or one per cent of the value of the metalliferous ore sold. It may and probably did have in mind that the measure of the value of the ore would be what was received directly from the smelter in a bona fide sale because it envisaged that as the usual situation in course of trade and did not think in terms of a consideration from another source. What was meant by a "bona fide sale" was a nonfictitious sale made on a free and open market. It probably had in mind and concluded that such receipts of such sale would measure the value of the ore, one per cent of which value was to be the measure of the tax. But the language does not need to be so limited. It is a tenable position that the paramount intent of the legislature was, at all events, to have the tax measured by one per cent of all moneys yielded by the sale, the event of sale being the time when the measuring rod should be applied.

The strongest argument of respondents is that the construction of the act itself made one per cent of the amount of money actually received from a bona fide sale of the ores (less reasonable costs of transportation) the basis of the computation and that that must mean money received from

the mill or smelter at ceiling prices without including the premium price. The answer is that the amount of money received for the ores are both the ceiling and premium prices, whether paid by the mill or smelter directly, subject to reimbursement from the Metals Reserve Company, or by the smelter and the Metals Reserve Company combined. The sale or delivery "for sale" to the mill or smelter is the occasion for the payment of the combination price. That is the occasion which gives assurance that the ore will not remain on the dump or in the stopes but will have made its entry into the channels of commerce. Under a fixed price the power of a commodity to command other commodities in exchange is not the same as on a free market. Value as meant by the legislature in Sec. 80-5-66 is no longer extant. The only remaining basis is the money received from the sale and certainly the money received from the sale is the total price which the sale yielded regardless of whether part of it would ultimately or immediately be paid by the Metals Reserve Company either directly or indirectly.

This conception comports with the overarching intent of the legislature and with the realities of the entire situation as previously set out. The manner which the government adopted for compensating the marginal or over quota producer for the mining and disposal of his ore, admitting the motive was increased incentive to produce, is not controlling. If the government had purchased all the ore directly and paid each producer directly the ceiling price and the premium price, if he were entitled to any, there would have been but little difficulty with the meaning of the word "sale" as used in the statute. By calling one part of the total amount received the sale price and the other part a subsidy it cannot be made to appear that the latter part should be excluded from what in reality, and I think in concept of law, is the total sale price.

I have above discussed the terms of the statute in the light of the proposition that the moneys paid by the Metals Reserve Company was in reality a part of a total price actually received by the owner or lessee from the sale of his ore albeit that total price may have come from two sources. But I would not want my views to rest on the narrow basis of what various parts of a total received were called. While in concept I think the whole can be conceived of in law as the price the sale yields, in final analysis I do not believe it makes much difference whether the part which the smelters pay is called a ceiling price and the other a premium price or a subsidy. After all we should look through terms to realities. As holds the main opinion in reality the "Amount of money * * * actually received by the owner * * * from the sale of all ores or metals during the calendar year * * *" was what those sales yielded and what they yielded was what was received from the mills or smelters or others to whom they were delivered plus what the Metals Reserve Company paid.

For the reasons contained in the main opinion as modified or augmented herein, I concur.

LARSON, Chief Justice.

I dissent. I think the judgment of the District Court was correct. As pointed out in the opinion, the statute imposes "an occupation tax equal to 1 percent of the gross amount received for, or the gross value of metalliferous ore sold," and fixes the basis of computation as the amount of money actually received from the sale of ores or metals under a bona fide contract of sale, less transportation charges from the mine to delivery point; but in the event that the ore is treated at a mill, smelter or reduction works, owned by the same interests as mines the ore's value shall be figured on the values such smelter or reduction works would pay for the

ore or metal received by it from independent sources.

Are the premium payments made by the War Production Board included within this base? To me, it seems evident they are not included. In the first place, the premium payments are not money received for the ores or metals under a bona fide contract of sale.

Secondly, if the ore is milled, smelted, or reduced in a plant owned by the miner, which plant also treats independent ores, the value of the ores at the mill is the value for determining gross proceeds, the same as would be the value to the independent producer.

But the real question is: Is the premium payment an increase in the sale price of ore? It seems rather inconsistent to say the government would fix a sale of 12c for copper to some people and 17c to other parties under a program to insure equality or uniformity in prices. It hardly strikes sound to say the government was black-marketing itself. Yet that seems to be what the situation would amount to. Let us note the statement of the War Production Board to which reference is made in the opinion and from which I shall quote more fully. The statement consists of Rules "by which * * * mine operators may obtain premium prices for over quota *production*," the "Purpose of the plan is to *expand the output of*" needed metals.

"Quotas will be fixed to include all output that can reasonably be expected at established market prices."

"Purpose of the premium plan is to *compensate* opertors for *extra costs* involved in bringing out additional metal output."

"The premium payment plan has been established to make it possible quickly to *increase production* by *mining low grade submarginal ores,* and *to develop* additional reserves."

"The *only purpose* of the premium price plan is to

compensate for extra costs involved ***in bringing out*** the *additional metal output*."

"Should any mining property fail to maintain its quota production, premium payments will be made." (All italics are mine.)

I come now to the quoted statement in the opinion of Mr. Justice Wade: "Premium payments will be based upon metal paid for under the terms of settlement contracts," which statement I think is misconstrued and misapplied. Settlement contracts are the contracts between the mine and the smelter. The quoted statement when read in connection with the whole declaration of which it is a part, does not justify the construction that premium payments are paid on ores sold. It simply gives the rule that computations for premium payments will be figured upon the basis of metal not only mined but actually turned into the channel of trade, so as to be available for the needs created by the war. In other words the mining operators cannot mine the ores, hold them and claim they have satisfied their quotas and had some overproduction for which they are entitled to premium payments. The metals will not be considered produced until turned into the channels of trade and manufacture. Computations therefore will be figured from the amount of metal bona fidely sold, and not upon the quantity mined. These payments are made only for the extra costs of bringing to trade the submarginal ores. It is somewhat analogous to the statutory provision deducting the cost of transporting the ores from the place where mined to the smelter. I think the premium payments are not within the contemplation of the statute included within the "amount received from the sale of ores under bona fide contracts of sale." I therefore dissent.

PRATT, J., not participating.